that when he stopped the car, the Opel and the Volkswagen were some distance away from the scene of the collision. It might well be that Krishnasamy had seen the head lights of the two approaching cars. But even so, he could not possibly have known what type of vehicles they were and at what speed they were travelling. In the circumstances he could not reasonably have foreseen that the two approaching cars would arrive simultaneously at the spot where the Fiat was was parked. Nor could he reasonably have foreseen that there was going to be an accident. It might well be that he was aware of the risk involved in parking his car, as he did, on the road. The risk of an accident happening on the road is a possibility which every motorist has learnt to accept. As pointed out by Lord Porter in *Bolton and Others* v. *Stone*[11] at page 108:

"... The existence of some risk is an ordinary incident of life, even when all due care has been, as it must be, taken."

It is not the law, said Lord Normand on page 1082, that precautions must be taken against every peril that can be foreseen by the timorous. From the same case the following passage from the judgment of Lord Reid at page 1086 seems most pertinent:

"... In the crowded conditions of modern life even the most careful person cannot avoid creating some risks and accepting others. What a man must not do, and what I think a careful man tries not to do, is to create a risk which is substantial."

I am unable to find in what Krishnasamy has done in this case anything which can be described as creating a risk which is substantial. The risk of a collision between the two approaching cars, had Krishnasamy been aware of it, could only be a remote possibility against which he is not in law required to take extraordinary precaution.

But one thing which seems clear to me in this case is that the presence of the Fiat had in fact contributed to the accident. The damage on its offside would fairly suggest that the Opel had grazed it while swerving to the right. To that extent it was a causative factor of the accident. But this does not necessarily mean that Krishnasamy is to be held liable for common law negligence. That he is not so liable has just been discussed upon a consideration of the foreseeability test. One decided English case in which the facts were substantially similar to the facts of the present case is *Kelly* v. *W.R.N. Contracting Ltd. & Anor. (Burke, Third Party).*[27] Although the trial judge, Ashworth J., in that case did not discuss in any great detail the common law negligence, I have no doubt that his conclusion on the facts was based on well established principles. In that case, the plaintiff was injured when the lorry in which he was a passenger skidded and crashed through a wall. He sued the owner of the lorry who brought in a third party, a Dr. Burke, whose car, a Ford Anglia, was, at the time of the accident, parked near the bend which the defendant's lorry was negotiating. Dr. Burke's car was parked with its nearside wheels on the pavement and its offside wheels in the carriageway which was 31 feet wide. Ashworth, J. found on the facts that Dr. Burke's car had a causative effect or influence on the accident. Notwithstanding that he was clearly of the view that Dr. Burke was not liable for common law negligence. At page 923 he said:

"There is nothing at common law which rendered Dr. Burke's conduct blameworthy in any respect. He had about two or three feet of his little Ford Anglia on the highway. The road at that place is 31 feet wide, and there was abundant room for any vehicle carefully driven to pass that car with safety. I have no doubt at all if the claim against Dr. Burke depended on common law negligence it would fail, ..."

I feel disposed to think that the same view must be taken of the facts of the present case. It is true that in that case Dr. Burke was held liable to contribute to the damages but this was because he was in breach of a statutory duty, having parked his Ford Anglia near the bend. In this case we are not considering any breach of statutory duty.

Accordingly, I would dismiss this appeal with costs against the appellants.

Appeal dismissed.

Solicitors: *Dharmananda & Co.; K. A. Menon & Co.*

KONG NEN SIEW v. LIM SIEW HONG

[O.C.J. (Seah J.) January 25, 1971]

[Sibu — Matrimonial Cause No. 19 of 1970]

Chinese Customary Law — Foochow custom — Dissolution of marriage — Wife's incurable unsoundness of mind — Test of — Chinese Marriage Ordinance (Cap. 71, Sarawak 1948 Edn.) — Matrimonial Causes Ordinance (Sarawak Cap. 94), s. 1(2).

Family Law — Dissolution of marriage on ground that wife was incurably of unsound mind — Custody of children.

Evidence — Psychiatric nurse — Whether expert — Evidence Ordinance (Sarawak Cap. 54), s. 45.

There is a Foochow custom in Sarawak whereby a spouse may petition for dissolution of the marriage registered under the provisions of the Chinese Marriage Ordinance, on the ground that the respondent is suffering from an incurable mental illness which can be proved by admissible medical evidence by a competent witness. The test of what would constitute incurability of unsound mind is the same as in English law, namely her capacity to manage herself and her affairs including the problems of society and of married life and that she permanently lacked such capacity.

Cases referred to:-

(1) *Randall* v. *Randall* [1939] P. 131 at p. 137.

(2) *Lock* v. *Lock* [1958] 3 All E.R. 472.

(3) *Whysall* v. *Whysall* [1960] P. 52.

(4) *R.* v. *Majana bin Sumalag* (1957) S.C.R. 14.

(5) *Yuill* v. *Yuill* [1945] P. 15.

PETITION FOR DISSOLUTION OF MARRIAGE.

Cheng Kwang Li for the petitioner.

Joseph C. C. Tang for the respondent.

Seah J.: The husband petitioned for dissolution of his marriage on the sole ground that the respondent wife was incurably of unsound mind. This allegation was contested by the wife.

Mr. Cheng Kwang Li appeared for the petitioner and the respondent was represented by Mr. Joseph Tang.

It had not been disputed that on the 18th day of April, 1955 the petitioner and the respondent were lawfully married at Sebrang Ensurai, Sibu, Sarawak according to recognised Chinese marriage custom; that the said marriage had been duly registered under the provisions of the Chinese Marriage Ordinance under Certificate No. 23 which was produced and attached to the said petition. By virtue of section 1(2) of the Matrimonial Causes Ordinance (Cap. 94), the said Ordinance has no application to these proceedings. This petition shall be governed by Chinese marriage customary law and particularly the Foochow marriage customary law, in as much as the petitioner is a Foochow by race.

Counsel for the petitioner called Dato Ting Lik Hung to give expert evidence on Chinese marriage custom as practised in the state of Sarawak. Apart from being the Headman for Area No. 1 covering the Foochow community in the Sibu district, Dato Ting is also for many years a Registrar of Chinese Foochow marriages appointed under the provisions of the Chinese Marriage Ordinance. Dato Ting claims and I think justly claims that he is conversant with Chinese marriage customary law and particularly the Foochow custom. I take judicial notice of the fact that Dato Ting has appeared in this court in the past as an expert on Foochow customary law relating to marriage and divorce and his evidence had been accepted without question. For myself, I am satisfied that he is a recognised authority on Foochow custom pertaining to matrimonial matters in Sarawak and would treat him as an expert within the meaning of section 45 of the Evidence Ordinance.

According to him, a petition for divorce may be presented to the High Court either by the husband or the wife on the ground that the respondent is suffering from an incurable mental illness, which shall be proved by a doctor, that the patient is incapable of looking after his or her family properly. Under cross-examination by counsel for the respondent, Dato Ting testified that the mental illness must be incurable and shall be certified by a doctor. On the other hand, if the mental disorder is curable, it would not constitute a ground for divorce under Foochow customary law. Insanity in the medico-legal sense must necessarily denote a fairly advanced degree of disturbance or unsoundness of mind. The essential feature of mental illness is the failure, through incapacity of the individual, to maintain normal contact with external reality and to appreciate the distinction between what is going on in his own mind and what is going on beyond it in the world.

Before I can make any finding upon the evidence given in these proceedings, I must consider what the expression "incurably of unsound mind" means. This word has been the subject of much debate in the High Court in the United Kingdom in recent years. There is no statutory definition of the formula "incurably of unsound mind" in the English Matrimonial Causes Act, 1950. Dealing with the issue of unsoundness of mind within the meaning of the Matrimonial Causes Act, 1937 which is *in pari materia* with the 1950 Act, Sir Boyd Merriman P. in *Randall* v. *Randall*[1] at p. 137 said:

"Here let me say one word about the issue of unsoundness of mind. I am not going to lay down any test of the degree of unsoundness of mind necessary for the purposes of the Matrimonial Causes Act, because to do so would serve no useful purpose and might create difficulties. . . ."

Sir Boyd Merriman decided that the word must be given a wide interpretation to be determined on the facts of each case. *Randall* v. *Randall, supra,* was followed by Mr. Commissioner Latey Q.C. in *Lock* v. *Lock*[2] and applied by Phillimore J. (as he then was) in *Whysall* v. *Whysall.*[3] At page 66 Phillimore J. said:

"It seems to me that the intention of Parliament (dealing with the Matrimonial Causes Act, 1950) was to enable one spouse to obtain a dissolution of the marriage when the mental capacity of the other, despite five years' treatment, was such as to make it impossible for them to live a normal married life together, and when there was no prospect of any improvement in mental health which would make it possible for them to do so in the future. The state of mind envisaged was, accordingly, a degree of unsoundness or incapacity of mind properly called insanity. If a practical test of the degree is required, I think it is to be found in the phrase used in section 90 of the Lunacy Act, 1890 — 'incapable of managing himself and his affairs' — provided it is remembered that 'affairs' include the problems of society and of married life, and that the test of ability to manage affairs is that to be required of the reasonable man. . . . What effect is to be given to the word "incurably"? If a person may be discharged from hospital in a state in which he can resume married life, managing himself and his affairs, able to make a will and perhaps, to enter into contracts or act as a trustee, does the fact that he will always have to take a regular dose of a drug to guard against any recurrence of the disease prevent it being said that he is cured? . . . In my judgment, the test to be applied to the word 'incurably' is to be applied with common sense and with regard to the popular understanding of the term. I would conclude, therefore that in deciding whether a person is 'incurably of unsound mind' the test to be applied is whether by reason of his mental condition he is capable of managing himself and his affairs and, if not, whether he can hope to be restored to a state in which he will be able to do so".

It is plain from the English authorities that the test of incurably of unsound mind is that laid down by Phillimore J. in *Whysall* v. *Whysall, supra.* With respect, I would adopt the same reasoning and test to the present case. For the purpose of these proceedings, the words "unsoundness of mind" or "insanity" or "mental illness" would be deemed to bear the same meaning, there being no evidence nor was there any contention that these expressions should hold a different meaning.

In giving his evidence, Dato Ting stated that proof of incurability of unsound mind of the respondent should be certified by a doctor. In the light of the prevailing conditions existing in the state of Sarawak, I am not prepared to give this statement a literal interpretation. To do so would invariably cause injustice to many a petitioner, in view of the great shortage of medical officers in this country. It seems to me that proof of incurability of unsoundness of mind could be satisfactorily discharged by admissible medical evidence by any competent witness.

I would now consider the allegations of mental illness of the respondent. Besides the evidence of the petitioner, there was also the testimony of the psychiatric nurse, Chang Pak Hong, who is in charge of the Mental Health Unit of the Lau King Howe hospital, Sibu. I would deal with the evidence of the petitioner first.

The petitioner alleged that after the marriage in 1955, both he and the respondent lived at Sebrang Ensurai, Sibu for a year. They then moved to Sungai Bidut, Sibu and stayed there for three years. From there, the family went and resided in Roban in the Second Division, Sarawak and have been living there ever since. Immediately prior to 1964 or thereabout, the petitioner alleged that his wife showed signs of being mentally ill in that she begun to act strangely. The petitioner testified that the respondent used to smile to herself without any apparent reasons; would suddenly explode into violence as if indulging in self-defence; would carry a parang in her hand or sometimes would keep a pair of scissors beneath her pillow before retiring for the night. Reports of these strange behaviours had been made to the police station but the petitioner was advised by the officer-in-charge to look after his wife as there was nothing which the police could usefully do. Fearing that his wife might hurt other members of the family or might even kill herself or inflict injury to others, the petitioner wisely brought her to Sibu hospital for medical treatment. The petitioner alleged that the respondent, while behaving in the queer manner at Roban, could not do the household duties and the family meals had to be prepared by his own mother. It would appear from the evidence that the respondent was first treated at the Sibu Hospital but later, she was sent to the Sarawak Mental Hospital, Kuching for further treatment, as a voluntary patient, there being no evidence to show that she was committed there by an order of a competent court. Be that as it may, it was admitted by the respondent that she returned to Sibu in March, 1964 and resided and still continues to reside with her father at No. 6D, Tiong Hua Road, first floor, Sibu. During the time when the respondent lives with her father, the petitioner alleged that he used to visit her there from time to time. The purpose of all these visits appeared to be to ask the wife to return to the matrimonial home at Roban. It was abundantly clear from the evidence that the attempts had not been encouraging or successful. The petitioner alleged that every time he went to his father-in-law's residence, the respondent only spoke to him in monosyllables, and it was not possible for him to converse with her at all. The respondent also behaved rather oddly in that she appeared to keep on avoiding her husband. The petitioner said that his wife would leave the bedroom when he entered it and if he entered the kitchen, she would walk away to another part of the house. From this testimony, it would seem that the respondent appears to be devoid of emotion or feeling towards her husband. She appears to treat the petitioner like a stranger. The reason given by the respondent for not returning to the matrimonial home was that she is still mentally sick and is still under care and treatment. As to the evidence of the petitioner, he seems to be an honest person who gave his testimony frankly and candidly. I have no hesitation in holding that he was speaking the truth.

Chang Pak Hong, the psychiatric nurse attached to the Mental Health Unit in Sibu gave evidence for the petitioner. He said that he joined the Medical Department as a hospital assistant in 1958. He worked for about six years at the Sarawak Mental Hospital at Kuching before being sent to England for further training in psychiatric nursing in 1964. He qualified as a psychiatric nurse and was awarded a diploma issued by the Psychiatric Nursing Council of England & Wales in 1967. On his return from the United Kingdom, he was transferred to take charge of the Mental Health Unit in Sibu on 12th September, 1967, and have been here ever since. Despite objection from counsel for the respondent, I held that Chang Pak Hong is qualified to be an expert within the meaning of section 45 of the Evidence Ordinance and might give evidence and opinion relating to mental health in general. I adopt this course having regard to the case of *Regina* v. *Majana bin Sumalag*[4] where Smith J. held that:

> "it is unwise to reject semi-skilled or semi-professional opinion. The court should adapt itself to the circumstances of the country and take advantage of such knowledge as may be available".

In that case, the second-grade dresser was asked about his opinion when death occurred. That was a criminal trial. *A fortiori*, in these proceedings, where the witness had undergone some form of specialised training in the United Kingdom and had attained certain professional standards.

Although there was no dispute that the respondent was treated for mental illness in 1964 at the Lau King Howe Hospital as well as at the Sarawak Mental Hospital in Kuching, there was apparently no record kept of her treatment, because the case history only commenced in the year 1967. Reading from the record, Chang Pak Hong told the court that the respondent whom he recognised as one of his patients, was first seen by Alfred Digat on 8th April, 1967. At that time, Alfred Digat was officer-in-charge of the Mental Health Unit in Sibu. The respondent was also seen by Dr. Toke who was medical officer-in-charge of Sarawak Mental Hospital in Kuching on 9th August, 1967. Dr. Toke however, did not diagnose his patient. On 6th October, 1967 the respondent was examined by Dr Karl Schmidt, a psychiatric specialist of considerable experience attached to the Sarawak Mental Hospital and he diagnosed the respondent as suffering from endogenous depression. Insofar as Chang Pak Hong was concerned, he saw the respondent as a voluntary patient the first time on 5th February, 1968. He was then the psychiatric nurse in charge of the Mental Health Unit in Sibu. It appeared that the respondent was admitted into the hospital on 25th March, 1969 and was discharged on 12th April, 1969 After her discharge from the hospital, the respondent was and still is being treated as a regular voluntary outpatient. She is always accompanied by her father whenever she comes for treatment. It is normal to suggest that such a patient should be placed under proper care, and if necessary domestically restrained, either for her own safety and well-being or for the well-being and safety of others. In his evidence, the psychiatric nurse stated

that he put and is still putting the respondent under "Melleril" a form of tranquillizer which would help the mind to think properly as well as to allay aggressiveness. A patient suffering from endogenous depression usually suffers from delusions, hallucinations and illusions. This witness is of the view that if the respondent fails to come for care and treatment and if the treatment of "Melleril" drug should stop, the patient would suffer a relapse. The inference is clear, it is necessary for the respondent to continue the treatment. In his opinion the respondent would not be able to look after herself, and he has not in his limited experience come across an endogenous depression patient being completely cured after treatment.

At the conclusion of the evidence of the petitioner, counsel for the respondent wished to make a submission of no case to answer. In accordance with the practice adopted in the Divorce Division of the High Court in the United Kingdom, (see *Yuill* v. *Yuill*[5]) the court informed counsel of refusing to rule on the submission unless counsel made it clear that he was going to call no evidence. In other words, counsel was asked to make an election. Counsel then applied for and was granted a brief adjournment to consider this matter. On resumption, respondent's counsel intimated that he would not be calling any evidence, and proceeded to make his submission. It is worthy of note that in filing an answer to the petition, paragraph 1 reads: —

"The respondent admits that in 1964 she was sent to hospital for medical treatment and that by the end of 1964 she had been cured of her illness".

No evidence was adduced to substantiate this statement. I take it to be the law that the onus is on the petitioner to prove that the respondent is of unsound mind and that the unsoundness of mind is incurable.

Relying on the expert evidence of Dato Ting Lik Hung, I am satisfied that there exists a Foochow custom in Sarawak whereby a spouse may petition for dissolution of the marriage registered under the provisions of the Chinese Marriage Ordinance, on the ground that the respondent is suffering from an incurable mental illness which can be proved by admissible medical evidence by a competent witness. The test of what would constitute "incurably of unsound mind" is the same as in English law, namely her capacity to manage herself and her affairs including the problems of society and of married life and that she permanently lacked such capacity.

Having considered all the evidence given in this case, I am satisfied that the petitioner had discharged the burden of proof. Notwithstanding the presence of the respondent in court, I was satisfied that she was and still is suffering from unsound mind and that her mental illness is incurable within the meaning of the test expounded above.

I was also satisfied on the evidence adduced that prior to 1964, the conduct of the petitioner did not conduce to the respondent's mental state and condition. Accordingly I make an order dissolving the Chinese marriage contracted between the petitioner and the respondent forthwith.

Since leaving the matrimonial home in Roban in 1964, the respondent had never returned to it. During all this time, she has been living with her father in Sibu. All the five children of the marriage have always been taken care of first, by the mother of the petitioner and later by the eldest daughter, Kong Bee Lian (f). I think it is in the best interest of the children that they should stay together. In view of the finding of the court, and apparently there was no objection from the respondent or her counsel, I order that the petitioner shall have the care and custody of all the five children of the marriage.

Under the circumstances of the case and in the exercise of my judicial discretion, I make no order as to costs. Each party shall therefore pay his or her own costs in these proceedings.

Order accordingly.

MYRIAM v. MOHAMED ARIFF

[O.C.J. (Abdul Hamid J.) January 26, 1971]

[Kuala Lumpur — Originating Summons No. 344 of 1969]

Infants — Guardianship — Guardianship of Infants Act, 1961, ss. 5 and 11 — Whether Act applicable to infants who are Muslims — Whether application can be made to High Court despite consent order made by a Kathi — Paramount consideration welfare of the child — Selangor Administration of Muslim Law Enactment, 1952, ss. 45 and 46 — Civil Law Ordinance, 1956, s. 27.

Muslim Law — Infants — Guardianship — Welfare of child — Primary consideration.

This was an application for the custody of two infants, a girl aged 8 years and a boy aged 3 years. The applicant, the mother of the infants, had been divorced by the respondent, the father of the infants. At the time of the divorce, the *Kathi* had recorded a consent order giving the custody of the infants to the respondent. Since the divorce the applicant had remarried a man not related to the infants. It was contended by the respondent *inter alia* (a) that the applicant was precluded from making the application as she had consented to the order for custody made by the *Kathi;* (b) that the Guardianship of Infants Act, 1961 was inapplicable as the infants were Muslims.

Held: (1) in the light of section 45(6) of the Selangor Administration of Muslim Law Enactment which provided that nothing in the Act shall affect the jurisdiction of any civil court, the applicant was entitled to make the application, despite the consent order made by the *Kathi,* and the court had jurisdiction to hear the application;

(2) that sections 5 and 11 of the Guardianship of Infants Act, 1961 were applicable, as there was nothing to show that these provisions conflicted with or were contrary to the Muslim religion or custom of the Malays;

(3) that in applying the provisions of the Guardianship of Infants Act, regard must be had to the religion and customs of the parties concerned, but the decision need not be made in accordance with the rules of the religion or custom except when it relates to or concerns a person under the age of 18 years professing the Muslim religion, in which case any provision which conflicts with or is contrary to the Muslim religion or custom of the Malays will not apply;

(4) that both under the English law and the Muslim law the primary consideration is the welfare of the child and applying this consideration in this case, the custody of the girl would be given to the respondent and the custody of the boy to the applicant until he reaches the age of 7 or 8 years